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Memorandum

To: David O'Steen, Executive Director, National Right to Life Committee,
Mike Fichter, President, Indiana Right to Life

From: James Bopp, Jr., General Counsel, National Right to Life Committee,
Courtney Milbank, General Counsel, Indiana Right to Life

Date: July 24, 2022

Regarding: Legal Analysis of SB 1: A Wolf in Sheep's Clothing

As attorneys for National Right to Life and Indiana Right to Life, you have asked our legal analysis of, and opinion on, SB 1, currently pending in the Indiana State Senate and upon which a hearing will be held on July 25 and 26. SB 1 was drafted by the Senate Republican Leadership and introduced on July 20th. Below is our response.

The Bopp Law Firm has represented Indiana Right to Life since 1976 and National Right to Life since 1978. A significant part of that legal representation has involve drafting and analysis of legislation for both Indiana and the Nation. As part of any legal analysis, we examine what the bill does and, then, whether what it does is in accord with the goals of the pro-life movement.

An expert analysis of SB 1 is particularly critical here since it represents the first bill introduced in the Indiana General Assembly to attempt to exercise the power restored to the states to protect unborn life since the overturning of *Roe v. Wade* in the recent *Dobbs* decision.

Furthermore, the Indiana General Assembly is likely to be the first state in the Nation to have its legislature vote on legal protection for the unborn post-*Dobbs*, so the action of the Indiana Legislature is likely to have effect beyond Indiana, and throughout the Nation.

It is with bitter disappointment that it is our opinion that SB 1 is a wolf in sheep's clothing, protecting abortion on demand by defective language, lack of necessary safeguards, and lack of any effective enforcement mechanism, even any criminal penalties, while parading as a pro-life measure. As a result, we recommend that NRLC and IRTL oppose SB 1 and urge the Indiana Legislature to pass truly pro-life legislation to protect the unborn.

A. General Summary of SB 1: a Wolf in Sheep's Clothing.

In general, SB 1 is an abject failure in achieving the pro-life movement's goal of extending substantial protection to innocent unborn life. While billed as prohibiting abortion except to save the mother's life and for rape or incest, SB 1 utterly fails to limit abortions to these rare exceptions due to numerous and pervasive legal flaws and omissions and a total lack of any criminal or civil penalties. If adopted, SB 1 would result in the continuation of abortion on demand throughout pregnancy in Indiana.

The total ineffectiveness of SB 1 to protect unborn life is, in part, the inevitable result of its formulation process. We know of no local, state or national prolife organization or any expert pro-life lawyer that the Senate Leadership consulted in drafting SB 1, but instead, SB 1 was drafted based on the advice of abortion rights advocates, using their suggested language, as Senate President Rodric Bray explained in his press conference last Wednesday introducing SB 1, from groups such as ACOG, the American College of Obstetricians and Gynecologists, which

is one of the foremost pro-abortion advocacy groups in the Nation, whose goal is “to defend and expand access to abortion at all levels.”¹ Of course, ACOG’s goal is not to help formulate effective pro-life laws but to undermine and to gut them.

B. Effect of Formulation Process on SB 1.

The pro-abortion groups and individuals consulted by the Senate Leadership used various strategies in proposing wording, or objecting to the addition of needed provisions, in order to undermine and gut any pro-life effect that SB 1 might have had. A detailed examination of SB 1 reveals that, at every turn, fatal flaws were incorporated into SB 1 setting up inevitable, and likely successful, litigation, which would result in the whole law being struck down, and that needed safeguards or enforcement mechanisms were omitted. The result is that the pro-abortion advocates consulted by the Senate Leadership were successful, as SB 1 fails to provide any meaningful protection to the unborn.

There are three provisions that illustrate this point. First, the critical substantive requirements of SB 1 in Section 11, that abortion is prohibited except to save the life of the mother or for rape or incest, have no criminal penalties attached whatsoever. *See* Section 14. In addition, SB 1 gives absolute immunity to anyone for any abortion requested by a pregnant woman. The result of SB 1 is no penalties whatsoever, either criminal or civil, for performing illegal abortions in Indiana.

¹*See* ACOG, Abortion is Essential Health Care, <https://www.acog.org/advocacy/abortion-is-essential>.

Second, Section 11 of SB 1 waives the legal requirement for the consent of pregnant woman for an abortion if it is necessary to save her life, so that a physician *can abort a woman's baby over her objection*, a shocking deprivation both of her right to consent to medical treatment and of the very life of the unborn child she is carrying.

Third, the combination of changes made by Section 2 and 7 of SB 1 explicitly recognize, legalize and facilitate *chemical abortion clinics flourishing* throughout Indiana by failing to take any steps to prevent abortion inducing drug from flooding Indiana and by providing for “licences to existing and future (chemical) abortion clinics.” If abortion was truly limited to the circumstances of the life of the mother or for rape or incest, abortions in Indiana would be rare, maybe a few hundred a year, and only performed by mainstream physicians in appropriate health care settings when justified by legitimate reasons. SB 1, however, contemplates thousands of chemical abortions a year, which would be necessary to sustain a network of “licenced” chemical abortion clinics throughout Indiana.

Thus, SB 1 is not only pro-abortion by lifting all criminal penalties from any illegal abortions, but also by legalizing forced abortion on a pregnant woman, by authorizing abortion inducing drugs to flood Indiana, and by facilitating their use through the operation of current and future chemical abortion clinics throughout the state.

Furthermore, SB 1 also turns a blind eye to the biggest enforcement problem facing protecting the unborn – the refusal of radical Democrat Prosecutors, such as Ryan Mears of Marion County (Indianapolis), to prosecute illegal abortions under any new Indiana abortion

law.² Without alternate means of enforcing any new Indiana abortion law, Indianapolis, and thus the State of Indiana, will have unlimited abortion on demand throughout pregnancy. Despite this well known problem, SB 1 does nothing.

Finally, pro-abortion groups are now in the catbird's seat. They can cynically condemn SB 1 for being a "pro-life" bill, while knowing it is not, thereby enhancing SB 1's chances of passage in Indiana's pro-life legislature, and simultaneously activating and infuriating their pro-abortion base to defeat Republicans in the fall. Their complicity in helping to write SB 1 is a cynical ploy that needs to be defeated by substituting pro-life legislation for SB 1.

C. Specific Recommendations for Major Revisions of, and Necessary Additions to, SB 1.

SB 1 has major problems with nearly every provision that require numerous amendments, or just a total rewrite. Many of these problems are discussed, and proposed amendments are suggested, below:

(1) SB 1 Removes All Criminal Penalties for Illegal Abortions in Indiana.

The critical substantive requirements of SB 1 in Section 11, that abortion is prohibited except to save the life of the mother or for rape or incest, have no criminal penalties attached whatsoever. Section 14 of SB 1 removes all criminal penalties that applied under prior law to "an abortion not expressly provided for" under the law and now only provides penalties for partial birth abortions and dismemberment abortions. In addition, Section 20 of SB 1 gives

²<https://www.wfyi.org/news/articles/marion-county-prosecutor-wont-criminal-charges-seeking-abortion>.

absolute immunity to anyone for any abortion requested by a pregnant woman. The result of SB 1 is no penalties whatsoever, either criminal or civil, for performing an illegal abortions in Indiana. This obviously needs fixed.

(2) Totally Ineffective Enforcement Mechanism with Lawless Pro-abortion Democrat Prosecutors Standing in the Way.

Even if there were criminal penalties under SB 1, they would be totally ineffective. As to criminal penalties, the Marion County Prosecutor has already announced that he will not prosecute anyone under a new prolife abortion law so that abortion on demand throughout pregnancy will flourish in Indianapolis and thus in Indiana.

So SB 1 relies exclusively on state licencing officials to enforce our abortion law. *See* Section 15. This, however, has proven to be totally ineffective in even enforcing Indiana's current modest abortion regulations and cannot be expected to be more effective in enforcing a pro-life law protecting the unborn.

Thus, the Indiana Attorney General should be given criminal enforcement power under this law, and authority to enforce Indiana's RICO law, against unlawful abortions and abortion clinics. Furthermore, the AG, Prosecutors, the pregnant woman and her family members should be give the authority to bring damage actions and to seek civil injunctions against unlawful abortions.

(3) Novel, Medically Inaccurate, and Unconstitutionally Vague Terminology in Key Phrases will Lead to SB 1's Enjoinment.

SB 1 uses novel, medically inaccurate, and unconstitutionally vague terminology to define the key terms of “abortion,” “fetus,” “pregnancy,” in Section 1, 3, and 4, and the life of the mother exception in Section 11. The likely result is a vagueness lawsuit that would enjoin the entire law. These definitions need to be corrected. Furthermore, a key element of a proper definition of abortion is missing, and needs to be added, that an abortion only occurs if the “woman is known to be pregnant,” so that no contraceptives are implicated.

(4) No Adequate Safeguards for Rape or Incest Exception Leading to Abortion on Demand.

The only “safeguard” for the rape or incest exemption in Section 11 is the requirement of a secret confidential affidavit to the physician that the pregnancy is the result of rape or incest. This results in a huge loophole where any woman or girl could easily falsely claim rape or incest with the result of abortion on demand throughout pregnancy. Instead, proper reporting to law enforcement and child protective services should be required. In addition to an effective verification that the pregnancy actually resulted for criminal activity and the increased prospect of holding the criminal in account, this requirement protects women and girls from being thrust, unprotected, back into the hands of their abusers.

(5) SB 1 Authorizes Forced Abortion of Pregnant Women.

SB 1, in Section 11, waives the requirement for the consent of pregnant woman for an abortion that is necessary to save her life so that a physician can abort a woman without her

consent or even over her objection. This is a shocking denial of medical treatment choice for a pregnant woman and of the very life of her unborn baby, which should be eliminated.

(6) SB 1 Fails to Protect Parental Rights When Daughter Seeks an Abortion.

SB 1 also does nothing about the violations of parental rights that can be expected to result by abusers and others trafficking minors to seek illegal abortions in other states without parental knowledge. This should be prohibited.

(7) SB 1 Authorizes and Facilitates Abortion Inducing Drugs Flooding Indiana.

In Section 11, SB 1 repeals provisions regulating abortion inducing drugs in current law and does nothing to prevent Indiana from being flooded with such drugs for illegal abortions. Then, SB 1 authorizes, legalizes and legitimizes chemical abortion clinics being set up throughout the state to perform chemical abortions by continuing and enhancing Indiana's licencing of "existing and future (chemical) abortion clinics." *See* Sections 2 and 7.

The scheme created by SB 1, therefor, recognizes that chemical abortions will continue to flourish in Indiana and authorizes chemical abortion clinics to facilitate this. With the changes recommended above, and others, abortion will finally be rare in Indiana, maybe a few hundred a year, and only performed by mainstream physicians in appropriate health care settings when justified by legitimate reasons. SB 1, however, contemplates thousands of chemical abortions a year, which would be necessary to sustain a network of chemical abortion clinics throughout Indiana.

SB 1 should be amended to exercise Indiana's limited authority to regulate the distribution of abortion inducing drugs by preventing their trafficking. Furthermore, with the changes

we have recommended, there is no need for Indiana to licence “existing and future (chemical) abortion clinics.”

D. SB 1 Should be Substantially Amended, or Replaced, to Provide Protection for the Unborn, Rather than, as Currently Written, Protecting Abortion on Demand.

As demonstrated above, SB 1 is a wolf in sheep’s clothing, protecting abortion on demand by defective language, lack of necessary safeguards, and lack of an effective enforcement mechanism, while parading as a pro-life measure. NRLC and IRTL should oppose SB 1 and urge the Senate to pass truly pro-life legislation to protect the unborn.